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No. 90-1061

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LOCAL UNION NO. 501 OF
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO,

Cross-Petitioner,

vs.

WESTCHESTER-FAIRFIELD CHAPTER OF
NATIONAL ELECTRICAL CONTRACTORS
ASSOCIATION, INC. and
TED KOZERA, MIKE HANLEY, CHRIS KULERS,
MICHAEL CINELLI, FRANK HONAN and
JAMES STEMMERMAN,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONSE IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Question Presented For Review

Whether the United States District Court for the Southern District of New York properly held, as a matter of law, that duress exercised upon a party to a contract by a non-party to the contract is insufficient to avoid the contract, unless the other party participated in some way in the duress?

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LOCAL UNION NO. 501 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Cross-Petitioner,

vs.

WESTCHESTER-FAIRFIELD CHAPTER OF NATIONAL ELECTRICAL CONTRACTORS ASSOCIATION, INC. and TED KOZERA, MIKE HANLEY, CHRIS KULERS, MICHAEL CINELLI, FRANK HONAN and JAMES STEMMERMAN,

Cross-Respondents.

RESPONSE IN OPPOSITION TO CROSS-PETITION

COUNTER-STATEMENT OF THE CASE

The collective bargaining relationship between the International Brotherhood of Electrical Workers ("IBEW") and the National Electrical

Contractors Association, Inc. ("NECA") is a long and successful one that has been singularly responsible for the labor relations stability in the electrical construction industry. A major element of that relationship is the Council on Industrial Relations for the Electrical Contracting Industry ("CIR"). Pursuant to provisions in local collective bargaining agreements, including that between IBEW Local 501 ("Local 501") and the Westchester-Fairfield Chapter of NECA ("Chapter"), the CIR arbitrates outstanding grievances and contract negotiation disputes submitted to that arbitration body.

The CIR is a national body composed of representatives of the IBEW and NECA and their local affiliates. Membership on the CIR is composed of an equal number of NECA and IBEW representatives. Many members are local union business managers and NECA Chapter managers. When the CIR deliberates, its members are not representing the IBEW or NECA in a bargaining relationship. It is the function of the CIR to represent the best interest of the electrical construction industry, through peaceful labor relations.

The success of the CIR in maintaining labor relations stability is attributable to the fact that the CIR members are themselves from the industry and, therefore, have a practical knowledge of practices and problems within the industry.

Negotiations for a new collective bargaining agreement between Local 501 and the Chapter were conducted from May 1986 through June 1986 by a Joint Labor Management Committee composed of representatives of the Chapter and Local 501. The Chapter consistently emphasized to Local 501 during these negotiations that it was essential for any new collective bargaining agreement to contain a Small Work Addendum. This Addendum was to provide a modified wage rate for residential and light commercial work to allow the union electrical contractors to compete more effectively with non-union electrical contractors and to recapture lost markets.

The Chapter and Local 501 agreed in a handwritten memorandum on June 13, 1986 to the terms of a collective bargaining agreement (hereinafter

referred to as the "Inside Wiremen's Agreement"), for a three year period which included a reference to the Small Work Addendum. The issue was negotiated at a meeting on April 27, 1987 and a proposed Residential Agreement and a Memorandum of Understanding were submitted by representatives of the IBEW and NECA.

Local 501 then submitted a draft of a proposed collective bargaining agreement to the Chapter which did not include any reference to residential or light commercial work. The Chapter refused to sign the draft agreement on the grounds that it did not reflect the June 13, 1986 Memorandum and did not incorporate the Small Work Addendum. Thereafter, Local 501 informed the Chapter it would submit the issue of the Small Work Agreement and the Chapter's refusal to sign the draft agreement to

the CIR for arbitration; and invited the Chapter to make a joint submission to the CIR. The Chapter agreed to the joint submission and its submission fell well within the scope of the issues in dispute.

The CIR, in its decision dated May 18, 1987 ordered both parties to sign the Inside Wiremen's Agreement and Residential Agreement.

Authorized representatives of the Chapter and Local 501 signed the Inside Wiremen's Agreement, Residential Agreement and the Memorandum of Understanding on June 11, and June 18, 1987.

The authorized representatives of Local 501 signed the agreements prior to the time of the Local 501 Executive Board Meeting on June 22, 1987, when internal disputes arose as to whether to challenge the CIR award and the

agreements. (Joint Appendix, PP. A-374, A-375, A-426.)[1]

Once the agreements were signed the Chapter treated the Residential Agreement as valid and began implementing its terms.

The District Court subsequently vacated the May 18, 1987 CIR decision and remanded the matter back to the arbitrators exclusively on the issue of whether the Chapter acted wrongfully in refusing to sign the Inside Wiremen's Agreement absent an agreement on the Small Work Addendum. (Joint Appendix, pp. A-307, A-308, A-312.) On remand the CIR issued a decision dated April 8, 1988, stating that absent a resolution

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[1]All Joint Appendix references are to the Joint Appendix to the United States Court of Appeals for the Second Circuit, Docket Nos. 89-9072, 9160.

by the parties on the Small Work Agreement, the Chapter was not required to sign the Inside Wiremen's Agreement. (Joint Appendix, p. A-905.)

At trial, with regard to Local 501's allegations that its representatives signed the agreements under duress, and on the basis of testimony heard, the Court repeatedly stated that there had been no evidence of any duress heard by the Court. (Trial Transcript: pp. 499, 502-503.)[2] In addition, the evidence presented indicated that the IBEW never directly threatened Local 501 (Joint Appendix: pp. A-532, A-535); and there was no evidence presented that the Chapter was

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[2]All Trial Transcript references are to the Record of proceedings in the U.S. District Court for the Southern District of New York, Civil Action No. 87-CV-5540(JES).

aware that Local 501 representatives signed the agreements out of fear of the IBEW (Joint Appendix: pp. A-523-A-525.) Further, the court indicated that Local 501 could have chosen other alternatives to signing the agreements (Joint Appendix: p. A-528.)

The District Court held, as a matter of law, there was no duress attributable to the Chapter (Joint Appendix: pp. A-612, A-632, A-633.)

The Court of Appeals for the Second Circuit held as to the remaining issues:
(1) that the District Court had properly vacated the first CIR arbitration award based on the grounds that the arbitrator had overstepped the authority delegated;
(2) the Chapter was justified in refusing to sign the Inside Wiremen's Agreement because said agreement was

contingent upon an agreement by the parties on the Residential Agreement;

(3) that the Residential Agreement and Inside Wiremen's Agreement were binding on the parties.

ARGUMENT

I. THE CHAPTER TAKES NO POSITION ON QUESTIONS "1", and "3" RAISED BY LOCAL 501 ON CROSS-PETITION FOR A WRIT OF CERTIORARI.

II. THERE IS NO SUBSTANTIAL NEED TO GRANT THE CROSS-PETITION ON THE QUESTION OF THIRD-PARTY DURESS RAISED BY LOCAL 501.

The Chapter disagrees with Local 501's erroneous analysis of the question of third-party duress.

Local 501's analysis of the law of duress exerted by third parties relies primarily on Section 175(2) of Restatement (Second), Contracts. The crux of Local 501's error lies within its analysis of the important exception to the rule regarding third-party duress and its misstatement of the facts of the instant case as they would apply to this exception.

The exception to the rule states:

> "There is, however, an important exception if the other party has, in good faith

> and without reason to know of the duress, given value or changed his position materially in reliance on the transaction." Restatement (Second), Contracts, Section 175(2) Comment (e).

Local 501 has misstated the facts on the record by maintaining that the Chapter not only had knowledge of the IBEW's duress, but somehow did not act in good faith through its submission to the CIR.

As the facts on the record clearly establish, Local 501 did not prove duress by any party. There was no evidence presented to prove that the IBEW ever threatened Local 501, or that the Chapter had any knowledge that the Local 501 representatives signed the agreements in question due to this fear of the IBEW.

Further, there is no evidence of bad faith on the part of the Chapter, in that its submission to the CIR fell well

within the scope of the issues in dispute. The Chapter's position demonstrated the importance of the Residential, Small Work Addendum in its submission.

The Second Circuit in its analysis of whether the Residential Agreement was an integral part of the Inside Wiremen's Agreement stated:

> In concluding that the agreement on residential work was fundamental to the existence of a collective bargaining agreement, the CIR presumably drew on its experience in analyzing the significance of the industry-wide dispute over contractor's lack of competitiveness in the residential market. Kozera v. Electrical Contractors, 909 F.2d 48 at ___, 134 LRRM 3033, 3038 (CA2 1990).

The rule on the law of third-party duress as stated in Restatement (Second), Contracts, supra. includes the additional exception where the other party to the contract has "given value or changed his position materially in

reliance on the transaction." The rule goes on to define "value" as including "a performance or a return promise that is consideration..." Once the agreements were signed the Chapter treated them as valid and began implementing them. The Chapter performed pursuant to the terms or promises made in accordance with the agreements.

Local 501 has also erroneously distinguished and misapplied the relevant facts in the case law relied upon by the District Court on the law of duress. The court in Citibank v. Grapic Scanning Corp., 459 F.Supp. 337 (S.D.N.Y. 1978) did not rule on the issue of duress since the plaintiff in that case was collaterally estopped from relitigating that issue. However, the dictum on third-party duress in that case and its reliance on W.R. Grimshaw

Co. v. Nevil C. Withrow Co. 248 F.2d 896, 905 (CA8 1957) provides necessary guidance to the court in its disposition of the issue of duress. The court's decision in that case regarding third-party duress as it follows the law of duress set forth in Restatement (Second), Contracts, supra. is directly on point as applied to the facts on the record in the instant case.

In addition, the District Court's reliance on Weinraub v. International Banknote Company, Inc. 422 F.Supp. 856 (S.D,N.Y. 1976) and Restatement (Second), Contracts, supra. is correct in that both support the proposition that even a threat by a party does not amount to duress if the victim "has a reasonable alternative" to the threat and fails to take advantage of this alternative. Both the District Court and the Second Circuit stated that the

representatives of Local 501 had alternatives to signing the agreements. (Joint Appendix, P. A-528 and Kozera v. Electrical Contractors supra. at ___, 134 LRRM 3038.)

CONCLUSION

As to questions "1" and "3" raised on cross-petition for a writ of certiorari, the Chapter takes no position.

As to the question of third-party duress, no writ should be granted.

Dated: January 15, 1991

Respectfully submitted,

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